NO. 13-938

IN THE

Supreme Court of the United States

CALS C. IFENATUORA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF AMICUS CURIAE THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of Petitioner Cals C. Ifenatuora (Docket Number 13-938).

The Constitution Project pursues its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, which are designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of the

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[1] No counsel for a party or party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus* curiae, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' consent for *amicus* curiae to submit a brief in this proceeding are filed with this brief.

American justice system.[2] Established in 2004, the National Right to Counsel Committee's mission was to examine, across the country, whether criminal defendants (and juveniles charged with delinquency) who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of this Court, and the applicable rules of the legal profession.

The National Right to Counsel Committee spent several years examining the ability of various jurisdictions to provide adequate counsel to indigent individuals charged in criminal and juvenile delinquency

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[2] The Committee includes, among others: Hon. Rhoda Billings (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice, North Carolina Supreme Court, 1985-1986, Chief Justice, 1986; Judge, State District Court, 1968-1972; Hon. Walter Mondale (Honorary Co- Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in support of the petitioner in *Gideon v. Wainwright*; Hon. William S. Sessions (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; Bruce Jacob, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*; Abe Krash, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented the petitioner in *Gideon v. Wainwright* (Affiliations listed for identification purposes only).

cases who are unable to afford lawyers. In 2009, the Committee issued its report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the vindication of the right to counsel nationwide, and based on those findings, made a number of substantive recommendations for reform.[3]

Among these recommendations for reform was the need for counsel to make the client aware of the collateral consequences of conviction. As mentioned in the report, the possibility of removal is certainly chief among the most serious collateral consequences that arise from a criminal conviction in this country. *See Justice Denied* at 72 ("Collateral consequences can result in more severe sanctions for a defendant than the actual criminal sentence, including loss of immigration status…").[4] *Justice Denied* is intended to inform decision-makers—including the courts—on the varying causes, effects, and solutions to the problems facing the provision of effective counsel in our country. It has been cited by a wide variety of national and state media as well as in state court opinions, and has been publicly praised by a wide array of public figures. *See e.g.*, Editorial, *The Sorry State of Indigent Defense*, Wash Post, Dec. 9, 2010; Steven Zeidman, *Indigent Defense: Caseload Standards*,

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[3] *Justice Denied* is available on The Constitution Project's website, www.constitutionproject.org.

[4] This Court in *Padilla v. Kentucky,* 559 U.S. 356 (2010), subsequently recognized that a defendant's Sixth Amendment right extends to advice regarding the collateral deportation implications of a guilty plea. *See infra.*

New York Law Journal, Mar. 24, 2010, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975; Attorney General Eric Holder, Address at the American Council of Chief Defenders Conference (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/agspeech-090624.html. In addition, the Constitution Project has long been concerned about the use of procedural barriers in criminal cases to prevent review of credible claims of constitutional import.[5]

Accordingly, The Constitution Project has an interest as *amicus curiae* in this important case regarding the application of *Teague v. Lane*, 489 U.S. 288 (1989) to bar consideration of a collateral challenge to a federal conviction on the basis of ineffective assistance of counsel under *Padilla v. Kentucky,* 559 U.S. 356 (2010). In criminal proceedings bearing on removal, there is no greater responsibility than counsel ensuring a defendant is informed of the immigration consequences of his conviction—as for aliens such as Petitioner, these consequences may often be far graver than those posed by the prospect of the criminal conviction itself. Because this Court has long left unaddressed the issue of whether *Teague*'s limits ap-

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[5] For example, The Constitution Project's first report on the death penalty, *Mandatory Justice*, recommends that "State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence." *Mandatory Justice* is available on The Constitution Project's website, www.constitutionproject.org.

ply to collateral review of federal convictions, the petition for certiorari should be granted.

SUMMARY OF ARGUMENT

In this case, Cals C. Ifenatuora ("Petitioner") makes an *in coram nobis* challenge to his federal conviction. That challenge relies upon a new rule of constitutional criminal procedure articulated in *Padilla v. Kentucky*, 559 U.S. 356 (2010), requiring counsel to advise aliens of the potential immigration consequences of a criminal conviction. Petitioner's counsel did not so advise Petitioner of these consequences before he pleaded guilty to a federal crime. Now, after Petitioner has served his sentence for that crime, the United States seeks to make further, prospective use of that criminal conviction in a removal proceeding. As a result, Petitioner challenges that conviction as having been obtained in violation of *Padilla*.

Three aspects of this case make it appropriate for review in this Court.

1. Despite this Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), the federal courts of appeals continue to misapply this Court's retroactivity jurisprudence. Specifically, the court below—like other federal courts catalogued in Petitioner's Petition for Certiorari—feels constrained to apply in collateral review of federal criminal convictions the exception to retroactivity fashioned by the plurality in *Teague*—even though *Teague* applies only to proceedings under 28 U.S.C. § 2254. Indeed, this Court's retroactivity jurisprudence teaches that exceptions to the rule on retroactivity are narrow, and may be fashioned only by employing a balancing test that

considers the unique interests in play for the type of proceeding under review. This Court has never considered whether the *Teague* exception ***should*** apply to collateral review of federal convictions. Neither did the Court below—it simply assumed the applicability of the *Teague* rule without applying the balancing analysis required for the extension of *Teague*'s exception to the rule on retroactivity. That approach conflicts with this Court's retroactivity jurisprudence. *See, e.g., Danforth v. Minnesota*, 552 U.S. at 264.

2. The balancing of competing interests at play in this case demonstrates that the *Teague* exception to the rule on retroactivity should have no application here. The plurality in *Teague* found that the rule on retroactivity should not apply to federal review of state convictions because of the particular state/federal interests at issue in such proceedings. Specifically, the State's interests in comity and finality outweighed the individual's interest in protection of constitutional rights. Here, however, the balance is quite different. First, the comity interest that animated *Teague* has no place in collateral challenges in federal court of federal convictions.

Second, the United States has no significant interest in finality in this case because the United States seeks to make ***prospective*** use of Petitioner's criminal conviction to impose ***additional***, ***prospective*** punishment on him in the form of deportation. Petitioner's *in coram nobis* challenge, which comes after he served his sentence for the federal conviction, seeks only to prevent the government's prospective use of a conviction, tainted by a constitutional infirmity, to impose additional punishment and dep-

rivation of liberty on Petitioner not contemplated in his plea bargain. Indeed, such additional, prospective punishment could not have been contemplated in that plea bargain due to the very ineffective assistance-of-counsel issue that Petitioner seeks to raise here. Raising such an ineffective assistance-of-counsel claim in a collateral proceeding does not implicate significant finality interests.

Because this case presents no comity interest and no significant finality interest, the balance must tip in favor of upholding the individual's constitutional rights and the application of the traditional rule in favor of retroactivity. The Court should therefore allow Petitioner to proceed with his *Padilla* claim.

3. Even if the *Teague* exception does apply to this collateral challenge to Petitioner's federal conviction, *Padilla* represents the type of "watershed" rule of criminal procedure excluded from the *Teague* rule of non-retroactivity. As numerous commentators have recognized, this Court's decision in *Padilla* represents the equivalent of *Gideon v. Wainwright*, 372 U.S. 335 (1963), in the immigration context.

ARGUMENT

I. THIS PETITION PRESENTS AN IMPORTANT AND UNANSWERED QUESTION REGARDING THIS COURT'S JURISPRUDENCE ON THE RETROACTIVITY OF JUDICIAL DECISIONS—THE APPLICABILITY OF *TEAGUE V. LANE* TO COLLATERAL CHALLENGES OF FEDERAL CRIMINAL CONVICTIONS.

This Court should grant review to correct the erroneous application of this Court's retroactivity jurisprudence by the court below. The opinion by the Fourth Circuit below makes the same mistake that this Court corrected in *Danforth v. Minnesota*, 552 U.S. 264 (2008): unthinking application of the *Teague* exception to the rule on retroactivity in a context for which it does not fit. This case represents the appropriate vehicle for correcting this widespread error.

Traditionally, Supreme Court decisions have been fully retroactive in the sense of being applicable to all pending cases, including those awaiting appellate review and presenting application for post-conviction remedies. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1059 (1997); *e.g., Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1997) ("When this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

When this Court has departed from that general rule on retroactivity, it has done so on the basis of a balancing test that considers the specific factors unique to the context presented. Thus, in *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court held that the rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), though applied in the case in which it was announced, would not be applied retroactively to a state criminal conviction that had become final before *Mapp* was decided. A year later, in *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court asserted its power to make newly-propounded rules of criminal procedure non-retroactive, even to cases pending on direct review at the time the new rules were announced. *See id.* at 727, 732-733 (holding that the choice between retroactivity and non-retroactivity would depend on the purpose of the newly-propounded rule, the reliance placed on prior decisions, and the effect of retroactive application on the administration of justice).[6]

The Court's more recent retroactivity jurisprudence, however, makes clear the presumption in favor of full retroactive effect. *Griffith v. Kentucky*, 479 U.S. 314 (1987), rejected the approach in *Johnson*, *supra*:

> [F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication . . . . [A]fter we have de-

[6] Similarly, the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), articulated a flexible test for determining whether new rules should be applied retroactively in civil cases.

> cided on a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.

479 U.S. at 322-23. Similarly, the Court reasoned in *Harper*, *supra*, that *Griffith*'s concerns—that non-retroactive decisionmaking is the province of the legislature, and that such decisionmaking denies equal treatment to similarly-situated litigants—were equally applicable in civil cases. Most recently, this Court in *Danforth* endorsed giving retroactive effect to new rules of constitutional procedure in state habeas proceedings.

The plurality decision in *Teague* on which the Fourth Circuit relied to reject Petitioner's claim in this case, like *Linkletter* and *Johnson*, represents another example of employing a balancing test in order to depart from the general rule regarding retroactivity. In *Teague*, a plurality of the Court concluded that the unique considerations of comity and finality on federal habeas review of state criminal convictions justified a general rule of non-retroactivity. *Teague*, 489 U.S. at 308-09 (plurality opinion). Justice O'Connor's plurality opinion relied heavily on the dissent by Justice Harlan in *Mackey v. United States*, 401 U.S. 667 (1971). There, Justice Harlan argued that decisions concerning retroactivity on habeas review "can be responsibly made only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise." *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in the judgments in part and dissenting in part). In *Teague*, Justice O'Connor's plurality opinion

weighed the need to respect and preserve constitutional rights and to ensure accuracy and integrity of convictions, against the State's interest in comity and finality. *Teague*, 489 U.S. at 308, 309. *See also* Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. Sch. L. Rev., 105, 107, 109 (2010) (noting that federal habeas review reflects a balancing of the "Blackstonian view" that judges are "not delegated to pronounce a new law, but to maintain and expound the old one," with "recognition that unrestrained application [of this principle] could create chaos in the judicial system") (citing *Linkletter*, 381 U.S. at 624; 1 William Blackstone, Commentaries * 69).

On the basis of that balancing, the plurality concluded that in federal habeas review of state convictions, "new constitutional rules . . . will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. Excluded from this rule, however, are (1) rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and (2) "watershed rules of criminal procedure" that implicate "the fundamental fairness that must underlie a conviction" and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 311-13, 315. As Justice Brennan observed at the time, the Court in *Teague* did not address whether this exception to the rule of retroactivity "extends to claims brought by federal, as well as state, prisoners." 489 U.S. at 327 n.1 (Brennan, J., dissenting).

This Court has since confirmed that the rule in *Teague* resulted from the balancing of the state/federal interests unique to that case. *See Danforth*, 552 U.S. at 272-73 ("the text and reasoning of Justice O'Connor's opinion [in *Teague*] illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions"); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting that the plurality decision in *Teague* was "motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on the constitutional standards that prevailed at the time the original proceedings took place") (internal quotation marks omitted); *see also Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) ("[*Teague*'s] 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts, and thus effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts") (internal quotation marks omitted); *Day v. McDonough*, 547 U.S. 198, 214 (2006) (Scalia, J., dissenting) (describing the rule devised in *Teague* as "necessary to protect the interests of comity and finality that federal collateral review of state criminal proceedings necessarily implicates").

This Court has consistently declined to rule on the question left unaddressed by *Teague* and presented here—whether the balance struck in *Teague* and the rule fashioned there for application to proceedings under 28 U.S.C. §2254 should also apply to collateral review of federal convictions in the context of the interests at play in this case. *See, e.g., Chaidez v. Unit-*

ed States, 133 S. Ct. 1103, 1113 n.16 (2013) (reserving the question of whether *Teague* applies to collateral review of federal convictions); *Danforth*, 552 U.S. at 279 (same). In the absence of such guidance, the courts of appeals, including the court below, have generally extended the *Teague* rule to such challenges to federal convictions. *See United States v. Chang Hong*, 671 F.3d 1147, 1150 n.4 (10th Cir. 2011) (collecting cases). In so doing, however, many of those courts have applied the *Teague* rule without conducting the balancing of the competing interests required by this Court for a departure from the general rule of retroactivity. *See, e.g.*, *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir. 2011) ("[T]here is some doubt under current Supreme Court jurisprudence whether *Teague* applies to *federal* prisoners . . . who seek federal habeas relief."); *Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009) ("It is not entirely clear that *Teague*'s framework is appropriate for federal habeas petitions under 18 U.S.C. § 2255, because many of the comity and federalism concerns animating *Teague* are lacking."). The Fourth Circuit followed the same approach here, applying *Teague* to the context of collateral review of federal criminal convictions.

The Fourth Circuit's decision represents just the sort of erroneous legal reasoning corrected by this Court in *Danforth*. There, the Minnesota Supreme Court believed that it "***must*** follow the *Teague* framework" when determining the retroactive effect of a new rule of constitutional law on collateral review. *Danforth v. State*, 718 N.W.2d 451, 456 (Minn. 2006) (emphasis in original). This Court reversed, holding that *Teague* "does not in any way limit the

authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'non-retroactive' under *Teague*." *Danforth*, 552 U.S. at 281. The same is true for federal courts, when reviewing their own criminal convictions. Borrowing a rule providing an exception to the general rule on retroactivity, fashioned specifically for application in proceedings under 28 U.S.C. §2254, and—without the appropriate balancing—applying it to proceedings challenging federal convictions, represents a misapplication of this Court's retroactivity jurisprudence and the specific teaching of *Danforth* that exceptions to retroactivity depend upon the particular balancing of interests presented. This Court should grant petitioner's petition for certiorari to correct this widespread error.

II. PROPER APPLICATION OF THE BALANCING TEST NECESSARY FOR A DEPARTURE FROM THE RULE ON RETROACTIVITY DOES NOT SUPPORT THE FOURTH CIRCUIT'S EXTENSION OF *TEAGUE* TO AN *IN CORAM NOBIS* CHALLENGE, BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL, TO A FEDERAL CONVICTION.

As noted above, *Teague* represents a compromise derived from balancing the individual's interest in preserving constitutional rights and the accuracy and integrity of convictions, against the State's interest in comity and the finality of its convictions. Because the comity interest is absent here, the government's interest in finality in this instance is insignificant, and as the government seeks prospective, affirmative ap-

plication of the conviction in this case, the balance must tip in favor of the traditional rule of retroactive application of judicial decisions. No significant counterweight exists to the individual's interest in preserving and protecting his constitutional rights and the government's interest in the accuracy and integrity of criminal convictions.

A. The absence of any comity interest weighing against retroactive application of constitutionally-derived rules of procedure to federal convictions is not reasonably debated here. As the plurality in *Teague* noted, state courts "are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover . . . new constitutional commands." 489 U.S. at 309. "In many ways," the plurality continued, "the application of new rules to cases on collateral review may be more intrusive [to the States] than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id*. (citing *Younger v. Harris*, 401 U.S. 37, 43-54 (1971)).

These federalism-based concerns simply do not apply to review in federal court of a federal conviction. Thus, the United States has conceded that "comity concerns are not implicated by collateral review of federal convictions." Br. of United States, *Chaidez v. United States* (No. 11-820) at 38. In short, one of the two main justifications offered by the plurality in *Teague* against the normal rule for retroactive application of judicial decisions is absent from the balancing here.

B. Furthermore, no significant finality interest hangs in the balance here, for at least three reasons. First, and most fundamentally, Petitioner's challenge raises none of the finality or deterrence issues that animated *Teague*. There, the plurality was concerned with the prospect that application of the normal rule of retroactivity would "continually force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." Here, Petitioner has already served his time for the underlying federal conviction. Any deterrence interest in upholding the underling sentence has therefore already been satisfied. Instead, the government here attempts to make ***further prospective use*** of that underlying conviction to impose what is in reality ***additional*** punishment on Petitioner—punishment beyond that contemplated in his plea bargain and which an immigration judge found could reasonably be considered to cost Petitioner his life.

Second, a collateral challenge to a federal conviction based upon ineffective assistance of counsel—the nature of Petitioner's action here—is properly considered a continuation of the federal criminal proceedings. Finally, the *Strickland* standard applicable to an ineffective assistance-of-counsel claim adequately protects the government's interest in finality. For these reasons, explained more fully below, the United States has no significant interest in finality here.

1. Petitioner's *in coram nobis* challenge to his conviction does not implicate significant finality interests. Because Petitioner served his time for the underling conviction and was released on parole in

1999, this challenge does not implicate the deterrence interests at issue when a petitioner seeks habeas review. Moreover, it is the United States, not Petitioner, that seeks to change the *status quo* here. The United States now seeks to make prospective use of the underlying federal conviction as the basis for removal of Petitioner from this country.

This additional use of Petitioner's conviction by the United States is a prospective use to impose additional punishment—one beyond that contemplated in Petitioner's plea bargain, and one that could not have been contemplated due to the ineffective assistance of counsel Petitioner seeks to address here. This Court has compared deportation to "banishment" and "exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *INS v. Errico*, 385 U.S. 214, 225 (1966). This Court has commented on the profound consequences of deportation, observing:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. ***That deportation is a penalty—at times a most serious one—cannot be doubted.***

Bridges v. Wixon, 326 U.S. 135, 154 (1945) (emphasis added). These observations are particularly apt where, as here, the defenses to deportation include claims for asylum and withholding of removal. Deportation in such cases can be the equivalent of a sentence of imprisonment, torture, or death.

None of this additional punishment was contemplated in Petitioner's plea bargain. The fact that the United States would now make that plea bargain the basis for prospective, additional punishment means that the government has no significant interest in finality here.

2. Consideration of the finality interest in collateral review relies on the critical assumption that a petitioner has already had a fair opportunity to raise his constitutional claims. *Teague*, 489 U.S. at 308-10; *see also Mackey*, 401 U.S. at 684 (1971) (Harlan, J., dissenting) (restrictions on retroactivity presume that the defendant had a fair opportunity to raise his arguments in the original criminal proceeding."). That is not the case for initial-review collateral challenges to federal convictions based on ineffective assistance of counsel, particularly those related to the adequacy of counsel during the plea-bargaining phase. Such challenges by their very nature depend on evidence outside of the trial record. *See Padilla v. Kentucky*, 559 U.S. at 368-69; *Massaro v. United States*, 538 U.S. 500, 508 (2003). Claims like that made by Petitioner—based on ineffective assistance through failure to advise of the immigration consequences of a guilty plea—for all practical purposes must be adjudicated for the first time in a collateral proceeding. *See Padilla*, 559 U.S. at 368-69. There are, therefore, no original final determinations of such ineffective-assistance claims for a court on collateral review to respect.

This Court has already acknowledged as much in its line of cases holding that the procedural-default doctrine, which is likewise aimed at respecting the

finality of judgments, does not apply to ineffective-assistance challenges to federal convictions that are raised for the first time on collateral review. *See Massaro*, 538 U.S. at 504; *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) (adding that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"); *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (adding that *Massaro* and *Martinez* apply where a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal").

The Court's delineation of this exception turned on its distinction of "initial-review collateral proceedings," which provide the first occasion to raise an ineffective-assistance claim, from other collateral proceedings. *Martinez v. Ryan*, 132 S. Ct. at 1311, 1315. Because "the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial," the Court found that such a proceeding "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317. The Court bolstered this analogy by noting that, in initial-review collateral proceedings, (1) the reviewing court considers the merits of the claim; (2) no other court has addressed the claim; and (3) defendants are ill-equipped to represent themselves because they do not have a brief from counsel or a court opinion addressing their claim. *Id.*

Like the collateral challenges at issue in *Martinez* and *Trevino*, Petitioner's writ of *coram nobis* is the first occasion for him to raise his ineffective-assistance-of-counsel claim, when the government seeks to use the conviction to obtain prospective relief. Notably, (1) the reviewing court would need to look to the merits of Petitioner's claim; (2) no other court has addressed the claim; and (3) Petitioner did not have the benefit of prior briefing or a court opinion addressing the claim. *Id.* Under this Court's reasoning in *Martinez* and *Trevino*, Petitioner's collateral appeal constitutes "the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." Thus, the concern for finality central to *Teague* reaches a vanishing point here. Instead, application of the *Teague* exception to the retroactivity rule to Petitioner's claim would "deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim," *Trevino*, 133 S. Ct. at 1921, before the conviction is used to obtain new, prospective relief.

3. Collateral challenges based on ineffective-assistance-of-counsel claims also should be excepted from the general rule of non-retroactivity because such challenges are subject to the "highly deferential" and "highly demanding" test set forth in *Strickland v. Washington*, 466 U.S. 668, 692-93 (1984), which accords the utmost respect for "the profound importance of finality in criminal proceedings," and adequately safeguards this interest against all but the most worthy of collateral challenges. *See Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986).

Under the two-part *Strickland* standard, the petitioner must show first that counsel's representation fell below an "objective standard of reasonableness," and second "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694. Both prongs of this test protect the finality of criminal judgments. *See id.* at 697 (noting that its "cause and prejudice" test is based on the "presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment") (citations omitted).

The objective-evaluation prong "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Ineffective-assistance-of-counsel claims are thus adjudicated according to the legal standards and prevailing professional norms of the time of the alleged conduct. The prejudice prong flips the typical standard for constitutional claims on its head: instead of assigning the burden on the prosecution to show that any alleged impropriety was harmless beyond a reasonable doubt, *Strickland* requires the defendant to demonstrate that he was prejudiced by his counsel's deficient performance. *Id.* at 694.[7] Given its highly

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[7] This "exceedingly difficult burden of proof" under *Strickland* is so substantial that The Constitution Project's National Right to Counsel Committee has called for the *Strickland* standard to be replaced by a straightforward test for determining ineffective assistance of counsel that would simply ask whether the accused received "competent" and "diligent" representation, as

(Continued . . . .)

demanding burdens of proof and significant protections against meritless challenges, *Strickland* ensures that finality is upheld in collateral challenges based on ineffective assistance of counsel, and thus renders *Teague*'s application to such challenges inappropriate and unnecessary. While this amicus remains concerned about the extraordinary burden *Strickland* places on petitioners who have received ineffective assistance, see generally *Justice Denied* at 39-43, the fact that petitioners are unlikely to receive relief on such claims demonstrates the role that *Strickland* plays in ensuring the finality of convictions.

The United States therefore has no comity interest and no significant interest in finality with respect to Petitioner's *in coram nobis* challenge to a federal conviction based on ineffective assistance of counsel, of which the government is now attempting to make prospective use. Petitioner, however, demonstrates a concrete example of the significant and compelling interests that exist in respecting and preserving constitutional rights and ensuring the integrity of the convictions on which the deprivations of life or liberty rest. As such, the traditional rule of retroactivity should apply to Petitioner's *in coram nobis* challenge, not the exception fashioned in *Teague*. The Fourth Circuit's decision to the contrary should therefore be reversed.

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required by the rules of professional conduct adopted by the legal profession. *Justice Denied*, at 40-43, 212-13.

III. EVEN IF THE RULE OF *TEAGUE* COULD APPLY, PETITIONER'S CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON *PADILLA* COMES WITHIN *TEAGUE*'S "WATERSHED RULE" EXCEPTION.

On March 31, 2010, this Court issued a "watershed" in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel"; that the ineffective-assistance standard set forth in "*Strickland* [v. *Washington*, 466 U.S. 668 (1984)] applie[d] to Padilla's claim"; and that, under *Strickland*, "counsel must advise her client regarding the risk of deportation." *Id.* at 366, 367.

Padilla overturned the near-unanimous view of state and federal courts that deportation was merely a collateral consequence of a criminal conviction, and that the Sixth Amendment does not require advice regarding collateral consequences. Before *Padilla*, the Court "ha[d] never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice" about the collateral consequences of a convictions. *Id.* at 377 (Alito, J., concurring). In the view of Justice Alito and Chief Justice Roberts, the *Padilla* decision represented a "dramatic departure from precedent," *id.*, that "mark[ed] a major upheaval in Sixth Amendment law," *id.*, at 383, as well as a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment." *Id.* As the dissenting Justices noted, the Court in *Padilla* broke from "the Sixth Amendment's textual limita-

tion to criminal prosecutions." *Id.* at 389 (Scalia, J., dissenting. The Court confirmed the significant departure represented by *Padilla* in *Chaidez*. 133 S. Ct. at 108-11.

Padilla represents a "watershed rule" for which the *Teague* exception against retroactivity does not apply. Although this Court has not yet provided a comprehensive definition for the "watershed rule" exclusion from *Teague*, it has consistently pointed to *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of such a rule." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007). This illustration is apt, and leads to the conclusion that *Padilla* represents just such a watershed rule. Just as *Gideon* revolutionized the way that the criminal justice system dealt with indigents, so too does *Padilla* revolutionize the way in which the system deals with aliens.

First, there is no question about the significant departure *Padilla* made from prior Sixth Amendment jurisprudence. As the dissenters in *Padilla* noted, that decision dissolved the line previously recognized between criminal prosecutions and collateral consequences of such prosecutions, such as deportation proceedings. *Padilla*, 559 U.S. at 389 (Alito, J., dissenting). Second, an alien's interests with respect to deportation are of the highest order. It is the equivalent of banishment or exile, *see supra* at 17 (citing *Fong Haw Tan*, 333 U.S. at 10), often for a person who has resided in the United States for an extended period of time and has family and friends there. A deportation proceeding—in which the Government, as the sovereign, affirmatively seeks to deprive a party of his liberty interests—is akin to a criminal trial.

Where the alien defends against deportation on the grounds of a well-founded fear of persecution, torture, or death, the stakes may be much higher than those in the typical criminal proceeding for which the Sixth Amendment right exists.

Given the significance of the decision in *Padilla* and its importance to aliens in the criminal justice system, it is akin to *Gideon* and thus a watershed rule excluded from *Teague*'s exemption for retroactivity. See*, e.g.,* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1118 (2011) and Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of Padilla v. Kentucky*: *Extending the Right to Counsel to the Collateral Consequences of Conviction*, 25 Crim. Just. 36, 37 (2010). The Fourth Circuit's decision to the contrary should therefore be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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